

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.966 of 2011

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Birju Kumar, S/O Mahavir Mahto, R/O Village - Chakwa, P.S. Khodawanpur, District – Begusarai.

.... Appellant

Versus

Anita Kumari @ Parwat Devi, D/O Sri Laddulal Mahto, R/O Village - Tara, P.S. Khodawanpur, District – Begusarai.

.... Respondent

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

and

HONOURABLE MR. JUSTICE SUDHIR SINGH

C.A.V. ORDER

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

21 16.09.2016.

This appeal has been filed against the judgment dated 14.06.2011, passed by the learned Principal Judge, Family Court, Begusarai, in Matrimonial Case No. 61/02, by which the application filed in the court below by the appellant for grant of decree of divorce against the respondent, in terms of Section 13 of the Hindu Marriage Act, 1955, has been dismissed.

2. The case of the appellant, in brief, is that his marriage with the respondent, namely, Anita Kumari @ Parwati Devi, was performed on 10.05.1998 as per customary rites and Ceremonies of the respective parties and on the very date itself, when the Barat of the appellant reached the village of the respondent, some anti-social elements assaulted the brother-in-law of the appellant with intent to force the 'Barat Party' as to return back, so the marriage could not be performed but anyhow the marriage solemnized. After marriage



the respondent went to her matrimonial house and stayed there for few days but returned back to her parental home as per the local custom and remained there continuously for a period of one year. Later on, the appellant learnt that the respondent being a corrupt lady, but he did not believe, as if, it be a rumour. The further contention of the appellant is that the respondent after coming back to the matrimonial house, started abusing and quarreling with the family members of the appellant and she was not willing to reside at her matrimonial house. When she was residing at matrimonial house, some youngsters of her native village usually came to meet her for one pretext or the others, which led strong suspicion in the mind of the appellant, regarding the conduct of the respondent. The appellant became vigilant and one day he found his wife writing a love letter to her beloved, whereupon her father was called and informed about the said conduct of the respondent. Thereafter the respondent tried to disassociate herself from the appellant, even by not sharing the bed. The respondent anyhow managed to procure some poison and started threatening the appellant and his family members as to take poison and implicating them in false case, whereupon her father was again informed regarding her subsequent conduct. Father of the respondent came and took his daughter back to parental home. The respondent refused to return back to her matrimonial house and in writing, she expressed her desire for dissolution of matrimonial relation. The further case of the



appellant is that the respondent has been leading an adulterous life and she also gave birth to an illegitimate female child. The last cause of action for filing the divorce case, is said to have been arisen on 15.10.2002 when the respondent informed the appellant to commit suicide if she would be compelled to live together with him.

3. No one appeared, on behalf of the respondent. However the case of the respondent is well discussed in the order under challenge. The respondent denied each and every contention of the appellant except for admitting the factum of marriage with the appellant and further that after the marriage she returned back to her parental house and remained there for one year. The respondent specifically denied that she ever quarreled and abused the family members of the appellant, having intention to return back to parental home. The respondent also denied that youngsters of her native village ever came to meet her, when she was residing at matrimonial home. There has been specific denial that she had been ever caught by her husband, writing a love-letter to anyone. The respondent has specifically denied that she had been leading an adulterous life and given birth to an illegitimate female child, as also, she ever expressed her desire for dissolution of marriage.

4. While commencing the trial, the learned court below framed altogether four issues, which are as under:-

- (i) Is the suit as framed maintainable?
- (ii) Has the petitioner got cause of action to seek a

decree of divorce as prayed for?

(iii) Whether the O.P. treated the petitioner and his family members with cruelty and she is living in adultery and has voluntary sexual intercourse with some other person and on such grounds the petitioner is entitled for dissolution of his marriage by the decree of divorce?

(iv) To what other relief or reliefs, if any, is the petitioner entitled to get?

5. On perusal of the judgment under challenge and the memo of appeal, we find that the learned court below while deciding the maintainability of the suit as framed, i.e. issue no.1 has held that since one of the main ground of dissolution of the marriage is adultery but the person with whom the opposite party (respondent) is said to have adulterous relation, has not been made party in this case, whereas the law requires to implead such person as opposite party, thus the matrimonial petition was defective on account of non-joinder of necessary party.

We further find that so far issue no.3 as framed by the learned court below, which relates to act of cruelty of the respondent and she having voluntary sexual intercourse with some other person than her spouse, is concerned the order under challenge speaks a volume regarding failure on the part of the appellant to prove act of cruelty as also the adultery alleged against the respondent. The learned trial court has



observed that incident of assaulting the brother-in-law of the petitioner on the date of marriage, has not been proved. So far the rumour regarding the bad character of the respondent's wife is concerned, none of the witnesses including the husband gave such evidence as to prove the bad character of the opposite party before the marriage. The learned trial court also has discussed in the judgment that in support of the ground of adultery, there has been pleading that some youth of native village of the opposite party used to visit at her matrimonial home but the petitioner being resident of neighboring village, ought to have disclosed the name of the persons in the matrimonial petition and moreover witnesses should have stated regarding the visit of such persons. The learned trial court had also discussed that so far the love-letters purportedly written by the opposite party i.e. Ext-1 to 1/c have not been duly proved, as the witness who proved the letter, has not deposed as to how he was acquainted with the writing of the opposite party. The petitioner also had not stated before the court that how did he come in possession of three letters besides one, which was taken by the petitioner, while the opposite party was writing it. It is very significant that during cross examination of the opposite party, the petitioner had an opportunity to confront her by showing the letters but she had not been cross

examined on the very fact, whereas he has specifically denied such letters to have been written by her during her examination in chief.

6. We may indicate here that in support of the factum of adultery, it has been stated that the opposite party gave birth to an illegitimate female child but nowhere in the pleading, there has been such statement that the appellant had no access to the respondent during that period and the birth of the child was not during the continuance of the marriage. Thus there cannot be presumption regarding the illegitimacy of the child rather in terms of Section 112 of The Indian Evidence Act, there would be a presumption regarding the legitimacy of the child, being born during continuance of the valid marriage. On the other hand as mentioned in the impugned order the appellant himself in para-10 of his evidence, has stated he has a daughter aged about 10 years, from his wife.

7. From the perusal of the discussions made in the order regarding the evidences of witnesses examined on behalf of the appellant, it is noticed that they have tried to develop a new story as to see the respondent while she was in compromising position with one Pramod Kumar. Such type of statement which is beyond pleading are hardly relevant as to prove that the respondent having illicit relation with anyone.

8. In support of the act of cruelty attributed against the

respondent, there is no such material on record to prove the same. The learned trial court has also in the impugned judgment noticed the statements made in paragraph 11 of the matrimonial petition that the opposite party expressed her desire in writing for disassociation from the petitioner and refused to return back to matrimonial home. In course of trial no such document was ever produced as to prove the unwillingness of the respondent to live with the appellant.

9. As we find from the order under challenge that the respondent in her testimony clearly stated that she wanted to live with her husband but she was ousted from matrimonial home. The other witnesses examined on behalf of the respondent also have said similarly that she was ousted from matrimonial house. None of these witnesses has been cross examined by the appellant though he had such opportunity to disbelieve the statements of witnesses examined on behalf of the opposite party.

10. We may notice here that while filing the matrimonial case, the appellant nowhere made any specific pleading that the respondent had voluntary sexual intercourse with someone other than the appellant, giving the name of the person which is necessary in terms of Rule 7 (g)(i) of the Family Court (Patna High Court) Rules, 2000, and further particulars of the act and acts, occasion and the place when such act or acts was or were committed together with the name and address of the person or persons with whom

sexual intercourse was committed, which are also required under the said rule 7 of the Family Courts (Patna High Court) Rules, 2000, which is as under:

“7 (g) If the petition is for divorce, the matrimonial offence alleged or other grounds upon which the relief is sought with full particulars so far as known to the petitioner, e.g.-

- (i) In the case of voluntary sexual intercourse with a person other than his or her spouse after marriage, the particulars of the act or acts, occasion and the place when such act or acts was or were committed together with the name and address of person or persons with whom sexual intercourse was committed;

Thus there is no such pleading which may constitute the ground of ‘adultery’ for decree of divorce. So far the ground of cruelty is concerned, the law requires that particular of the act of cruelty must be pleaded specifically in the matrimonial petition, which is lacking in the present case. So far the case of giving birth to an illegitimate female child by the respondent. It is an admitted fact that the child was born during the continuance of the valid marriage between

the respondent and the appellant, so there would be a presumption as to legitimacy of child, as being provided in Section 112 of the Indian Evidence Act.

11. From the aforesaid discussion, we arrive at the conclusion that appellant has failed to prove that the respondent has been leading an adulterous life and she treated the appellant with cruelty and deserted him.

12. In view of the aforesaid observations and discussions, we do not find any reason to interfere in the judgment dated 14.06.2011, passed by the learned Principal Judge, Family Court, Begusarai, in Matrimonial Case No. 61/2002.

13. This appeal is, accordingly, dismissed.

(Sudhir Singh, J)

I agree.
(Ramesh Kumar Datta,J)

(Ramesh Kumar Datta, J)

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